In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES EX REL. EMILY E. Parish, executrix of Joseph W. Parish, deceased, plaintiff in error,
v.
GEORGE BRUCE CORTELYOU, SECRETARY of the United States Treasury.

No. 111.

APPELLEE'S BRIEF.

As the court below and counsel for appellant in this mandamus proceeding agree upon the proposition that if the act of Congress of February 17, 1903 (32 Stat., p. 1612), "in its requirements, called for the exercise of judgment and discretion by the Secretary the peremptory writ should not be granted" (brief, p. 22), the present brief might well be confined to the question—

Does the act of 1903 referring this matter to the Secretary of the Treasury require him to use judgment and discretion or merely to make a calculation involving neither?

And perhaps the whole discussion of that question by this brief could be shortened into the question—

Why should a great committee of Congress deem it necessary to recommend the passage of a law re-

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quiring the Secretary of the Treasury to make such a calculation, instead of making that itself or getting some clerk to make it?

However, it may be well to add a few more words, and, first of all, to call attention to the fact that the only relief prayed is that the Secretary be required "to issue a draft to said plaintiff for the sum of $181,358.95, as found due as aforesaid by the auditor," he having "positively refused to pay the balance found by the said auditor."

HISTORICAL AND EXPLANATORY—R. S. 374.

In order to ascertain what Congress meant by the act of February 17, 1903, it is proper to examine the matters mentioned in it and see precisely what was the condition of affairs which the act was passed to enable the Secretary of the Treasury to set right.

What was the "case" in the Court of Claims in which evidence had been "collected?" How far had that case proceeded and why was not the matter finally settled by the Court of Claims or on appeal? What "judgments of court" had been rendered, and what moneys had been paid "in pursuance" of them and of "direct appropriation by Congress?"

What is the rule laid down in the Behan case?

With all these things Congress evidently had some acquaintance, and in the light of them it passed its law for the purpose of having the Secretary make a "full and complete examination into the claim of Joseph W. Parish against the United States for bal-

ance alleged to be due him by virtue of a contract made," etc.

As noted by the lower court referring to the evidence collected, "What this evidence was as a whole we are not advised." Especially is none of the Government's evidence before us. But the record and court reports enable us, except in regard to this evidence as a whole, to put ourselves at the point of view of Congress. The Secretary was not to stop at the findings of fact, but to go to this evidence. The "case" then was a claim for money due under a contract to furnish ice. The "claim" referred to the Secretary was identical with the "case," except that it "alleged" a *balance* of money "to be due by virtue of a contract," etc. That contract was simple and brief (R., p. 16), and bound Parish & Co. to deliver at Memphis, Nashville, St. Louis, and Cairo "the whole amount of ice required to be consumed" at those places during the year 1863, A No. 1 quality. For each ton delivered, inspected, and accepted by the local medical officer in charge they were to get $25 (Nashville), $16 (St. Louis), $20 (Cairo), and $20 (Memphis).

This contract was all, as it had to be, in "writing and signed by the contracting parties with their names at the end thereof." (R. S., 3744; 29 C. Cls. R., p. 264.)

It mentioned no total tonnage of ice and evidently contemplated calls for ice by or on behalf of the local medical officers, who were to receipt bills of lading and certify accounts, on which payments were to be made "from time to time."

No other contract is mentioned in the record, and certainly no altered or different contract was executed validly, i. e., in accordance with our statute of frauds. (R. S., 3744.)

The Court of Claims made no allowance, and an appeal was taken.

This court (100 U. S., 500) did not agree with the Court of Claims in certain respects which are important and to be considered later, and laid down a rule for the measure of damages which was supposed by a committee of Congress to be erroneous or inapplicable to the case and at variance with a later decision in the *Behan case*. (R., pp. 27, 49; 110 U. S., 344.)

In this connection it should be remarked the Senate committee thought the Supreme Court's error clearly arose from "their own mistaken allegation that Parish never offered to deliver the ice. If he had offered to deliver it then the court admits that his measure of damages would have been the contract price or the profits he might have made if he had done so," and the Behan case is cited. The Senate committee said this court had overlooked the ninth finding of the Court of Claims. The House committee (R., p. 27) considered the error to have arisen from overlooking this ninth finding of the Court of Claims, that "Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of the letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than 12,768 tons aforesaid."

What that committee complained of is the following passage in this court's opinion (R., p. 27):

> If claimants intended to treat the matter as a completed contract to deliver 5,000 tons at St. Louis, 5,000 at Cairo, 10,000 at Memphis, and 10,000 at Nashville, after the order of Brown, and to hold the Government to the contract price for all those amounts, they should have delivered or tendered or offered to deliver and demanded payment. Had they offered to deliver, and been in condition to deliver, or to use the old forms of declaration, if they had shown that they were ready and willing to deliver after such revocation, it would still remain a question as to the measure of damages, etc.

What the committee thought the court ought to have applied is the following from the Behan case:

> "The prima facie measure of damages for the breach of contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely, first, what he has already expended toward performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, can not always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when in the

> language of Chief Justice Nelson, in the case of *Masterson* v. *Mayor of Brooklyn* (7 Hill, 69), they are 'the direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.' Still, in order to furnish a ground for recovery in damages they must be proved. If not proved, or if they are of such a remote and speculative character that they can not be legally proved, the party is confined to his loss of actual outlay and expense."

The committee strangely imagined some overruling of one of these "rules" by the other.

If we turn to the special act we find that, whereas the ninth finding of the Court of Claims seems to imply a default on the part of the Government in not receiving the ice, and the rule in the Behan case expressly applies to a case of breach "in preventing the performance of the contract, without the fault of the other party," the special act directs the Secretary to ascertain, first of all, the full amount which should have been paid "if the said contract had been carried out in full, without change or default made by either of the parties thereto."

What does Congress expect the Secretary to understand by this?

If it had not wiped out and even expressly negatived finding [illegible]nd excluded the theory of any default by either party, we might understand the direction to apply the Behan case. But does Congress desire an arbitrary application of the Behan rule as to *damages* or *losses* by a *breach* where it assumes there has been no breach? If so, how is he to apply this rule?

The rule gives "two distinct items or grounds of damage, namely, what he has already expended toward performance (less the value of materials on hand); secondly, the profits he would realize by performing the whole contract; * * * in order to furnish a ground of recovery in damages they (profits) must be proved."

That is, actual expenditures, less the value of the property bought and not delivered, and profits where they are the direct and immediate fruits of the contract and parcel of it, constitute "the amount of the loss."

If a man contracts to accept 10 carloads of apples at $1,000 a carload, and refuses to receive more than 3 carloads, whereas 6 are bought for delivery at $600 apiece the *damages* are —

Expenditures, the 3 carloads, at $600 apiece, $1,800.

Profits (to be *proven*), 7 carloads, at $1,000, $7,000, less cost and all expenses about them, including freight, say $5,000—that is, $7,000—$5,000=$2,000.

Deduct *value* of the 3 carloads left on hand, say, $700 each, $2,100.

The damages would be, therefore, $1,800+$2,000–$2,100, viz, $1,700.

This is an illustration of applying the rule in the Behan case. If the contract is to be regarded as "carried out in full," the only rule is to pay the price in full.

Furthermore, as the contract called for no total tonnage of ice, the Secretary can not, in the nature of things, ascertain what would have been due "if the said contract had been carried out in full."

TWO COURTS DIFFER AND THE COMMITTEES FIND BOTH WRONG.

The matters about which the Supreme Court differed from the Court of Claims should next be examined.

The Court of Claims held that "the order of Brown," already mentioned, did not bind the Government. It read as follows:

> ASSISTANT SURGEON-GENERAL'S OFFICE,
> *St. Louis, Missouri, March, 25, 1863.*
> Messrs. J. W. PARISH & Co.
>
> GENTLEMEN: I am instructed by the Assistant Surgeon-General to direct that the ice which you have agreed to deliver at the points designated in your contract shall be distributed in the following quantities, viz:

	Tons.
At St. Louis	5,000
At Cairo	5,000
At Memphis	10,000
At Nashville	10,000

> making the total of 30,000 which you have contracted to deliver. The ice to be delivered

at *Nashville* and *Memphis* is for use of the sick of the armies in the field and should be furnished without delay.

Very respectfully,

Your obedient servant,

By order of the Assistant Surgeon-General:

JOSEPH B. BROWN,

Surgeon, United States Army.

The Court of Claims said:

> In our judgment, the letter of the Assistant Surgeon-General Wood was no part of the contract, and imposed no liability on the Government, and, as the claimant's case rests upon that, their petition must be dismissed. (12 Court of Claims, p. 620.)

Of course, the letter was no part of the contract, but this court said as matter of law that it was an "unequivocal *demand, under* that instrument, that the amount of 30,000 tons, part of an unlimited quantity which might have been required of the contractor, should be delivered as therein directed. It required promptitude and diligence in securing the ice." Of course this court was not making findings of fact, which it never does, but applying the law and logic to the contract and demand as quoted in the findings.

Unfortunately for the simplicity of our problem, neither all the ice demanded was delivered or hauled to the place of delivery, or all purchased outright for delivery, instead of being merely contracted for, nor was the demand left "unequivocal" for more than a week (from March 25 to April 2), when it was "suspended." It was never renewed.

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THREE FINAL SETTLEMENTS ALREADY MADE.

In order to show the complete history of the matter it ought to be said that, under the mandate of the Supreme Court, the Court of Claims allowed $10,444.91. The claimant applied to Congress; a committee asked the Surgeon-General for a report, who reported that 17,232 tons had been undelivered and wholly lost to Parish. How or why it was lost the act does not say. This act no more estops the Secretary *than it did this court*, as to losses, failure to tender and inability to deliver. Thereafter a special act directed the Secretary of the Treasury to pay him $58,341.85, being, as the act said, the balance of money laid out in the purchase of the 17,232 tons of ice. The report of the War Department was based upon "evidence taken before the Court of Claims and additional evidence before it," but not now before us nor authorized and directed to be considered by the Secretary.

Payment for the delivered ice, 12,768 tons, and of the $10,444.91, and $58,341 is admitted by claimant.

What he continued to ask for was the "profits" on the undelivered ice of the 30,000 tons. He seems to have thought that the Government having made an "unequivocal demand" for 30,000 tons under the contract, this demand became part of the contract and that no "suspension" could make it anything else or make it equivocal.

Thus far we have been seeking to put ourselves in the position of Congress when it passed the special

act—to see what had happened and the condition of affairs Congress was not quite satisfied about and sought to remedy through the determination and action of the Secretary of the Treasury.

IS THE CONSTRUCTION FAVORABLE TO CLAIMANT INEVITABLE?

Keeping in mind that the public property and rights can not be given away except by unequivocal language of Congress, let us inquire whether the claimant has now become entitled to pay for something not shown to be earned or justly due, but to be *given* through an unequivocal order to the Secretary to make an arbitrary calculation and pay the balance thus found.

"If rights claimed under the Government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them." [a]

We submit that such an arbitrary calculation is not clearly prescribed by any single clause of the act, even taking it apart from all the rest. Let us see.

Take the clause "that the Secretary shall determine and ascertain the full amount which should have been paid said J. W. Parish & Co. if the said contract had been carried out in full"

This, at first glance, may look positive and arbitrary; but it does not say which *would* have been paid, but "should" have been, and when we turn to the "contract," an ambiguity immediately arises, because

[a] Leavenworth, Lawrence and Galveston R. R. Co. *v.* U. S. 92 U. S. 733.

the contract "carried out in full" did not call for any particular quantity of ice. When we go beyond the contract in search of certainty as to that quantity, we find ourselves at once where the courts found themselves, that is, confronted with an order under the contract, its sudden suspension, partial deliveries, a contract calling for an "unlimited" quantity of ice and doubts as to the possibility of delivering some of the ice purchased.

This order was not the contract, even before its suspension (29 C. Cls. 264), and the special act nowhere speaks of this order, but only of the contract. And it states the contract as one, not to supply 30,000 tons, but "the whole amount of ice required to be consumed at Memphis," etc.

No other clause of the act seems to be worth quoting as an unambiguous order to make an arbitrary calculation and allowance.

On the other hand, the act in places unequivocally requires something different from an arbitrary calculation.

It unequivocally requires a *full and complete examination* of Parish's *claim* for a balance *alleged* to be due him *by virtue of the contract*. No language could more aptly refer to a special tribunal the adjudication of a claim in the light of the terms of a contract and the law and facts found to be involved. No language could be less apt to express an order to multiply so many tons by specified prices per ton and deduct from the total found the amounts paid and receipted for to the Treasury.

The law equally unequivocally and more than once insists upon the application of the rule as to the measure of damages for *breach* of contract to the facts found by the Secretary to be proven by the evidence "collected" by the Court of Claims.

If to do that properly is not to use judgment and discretion, we should like to know what would be.

He is to conclude "what balance, if any, is *due under the rule and evidence* prescribed herein." And why say "if any," when there would necessarily be one, on appellant's theory of the calculation directed?

It seems to us that the proper carrying out of this special act would require about as much judgment and discretion as the Secretary could muster, and that the task would probably have been entrusted to a court if the committees of Congress had not imagined the Court of Claims and this court unable to master the difficulties.

Certainly we can not in face of all the verbiage it uses understand Congress to mean that the Secretary is to do a sum in arithmetic which any small schoolboy could have done in five minutes, that is, multiply the prices per ton with the 30,000 tons and deduct the amounts already paid as per receipts on file in the Treasury.

Congress or its committee or some clerk could have done that in short order, and quite as well as the Secretary of the Treasury, who could then have been directed to pay the balance found.

But if Congress did mean to order that superfluous figuring, it did not say so in *unequivocal* or any

other language, but used very clear language in conflict with any such supposed intention.

But the claimant, as we understand, has conceded that something more than such a calculation was necessary under the special act, for he has conceded that the arbitrary calculation had to be preceded by somebody's ascertaining "amount saved by undelivered ice."

All he says is that the Secretary is not now the man to go into that, since the auditor has done everything for him.

He is not asking that the Secretary be required to determine "amount saved by undelivered ice," and thereafter make his arbitrary calculation; but he rests his whole case on the extraordinary proposition that all the work directed has been done already and that the Secretary must be ordered to pay what, not he, but the auditor, has found to be the balance by the whole, part discretionary and part arbitrary, performance.

This seems in principle to be a surrender of the whole contention; for two reasons—that the court must deny the only thing prayed for, since the act is not addressed to the auditor, but to the Secretary; and, second, that if part of the problem under the special act requires judgment and discretion, the result is the same as if all parts of the problem required them.

Every court makes mathematical calculations in arriving at its decisions of fact and of law; but it was

never heard that its work was any less adjudicating on that account.

And we do not need anything better than pages 10 and 11 of the claimant's petition as an answer to the proposition that there was no adjudicating to be done.

We may remark in passing that claimant seems to have become enamored of the phrase "prepared and ready to perform," as though that preparation and readiness were equivalent to performance. If the court meant that, it was inconsistent, both in saying what it did about the Lake Pepin ice and perhaps also in dismissing the claim. A man may be prepared and ready to perform without having gone to any expense for purchases, care or freight. He may have merely arranged to purchase or, as one of the Court of Claims findings in this case indicated, may have "contracted to purchase." What he may have lost by contracting to purchase raises a large and obscure inquiry. We refer to the findings only because the appellant insists that they should be referred to—at least, when favorable to him. He has similarly made a selection of favorable items from "the evidence collected."

Having thus given a general history and view of the controversy, let us come down to details.

A VITAL ADMISSIO.

What is it that the Secretary was expected, even as admitted by the claimant, to do under this special act?

Stripped of all confusing language, the claimant's theory is that the Secretary should have determined

from evidence collected by the Court of Claims how much he saved by not having to deliver the ice he claims to have purchased. And stripped of all emphatic statements as to how clear and indisputable that evidence is, that is a business as purely addressed to the judgment and discretion of the Secretary as can be imagined.

The weighing of evidence and drawing conclusions from it are two of the most important and characteristic functions of the judiciary.

But we can easily go beyond what the claimant is forced to admit.

It is not to be supposed that practical men in Congress intended the public moneys to be paid out until there should be a "full and complete examination" of the "claim" and a determination, as a result thereof, that a balance was really and fairly "due" the claimant "by virtue of a contract," as "alleged"—*that allegation being the "claim" itself.*

He is to get his facts from the evidence "collected." He is not told to regard the findings of the Court of Claims or decisions of the Supreme Court, or the act of 1886 allowing the $58,000, partly on evidence said to be on file in the War Department, as so many things adjudicated.

On the contrary, he is to examine the claim *de novo* in spite of the most solemn and authoritative adjudications on matters of fact and law.

The theory of standing by adjudications obviously would be fatal to the appellant's case.

It is because the Supreme Court says the Court of Claims had erred and the committees said this court had blundered that the Secretary is called in to examine the evidence collected and make a full and complete examination in the light of that and of the supposedly new and improved rule of Behan's case for the measure of damages.

From this it follows that he can make up his own mind as to how many tons were actually purchased, paid for, and not delivered.

He might reach a wholly different conclusion from that attributed to the Surgeon-General in 1886, especially as he has not the same evidence before him.

And suppose he finds (as he well may) what the Court of Claims did, that some of the Lake Pepin ice could not have been gotten to its destination, and finds that though it was purchased as alleged and its value calculated and paid for by Congress, yet its delivery was not prevented by the Government, but was prevented by the things mentioned by the Court of Claims, is he blindly to apply the Behan rule about lost profits to this Lake Pepin ice, and if so, how?

Appellant did not, as that rule contemplates, lose these profits because the one party "prevented" delivery "without fault of the other party." The Court of Claims found he was not in a "condition to deliver" the ice because transportation was impossible. (R., p. 4.) That was not the other party's fault, but his misfortune or miscalculation.

Nor is there any room in this case, and especially as to that ice, for the principle that failure to tender is no breach, if the other party clearly shows that acceptance would be declined. For the record indicates, it seems to us, that the Government took about all the ice that was actually offered to it and could be delivered under the contract. Ice in large quantities was taken at all four places—St. Louis, Cairo, Memphis, Nashville. (R., p. 3.) And there is no indication that any ice was declined.

AN OVERLOOKED FINDING.

Light is thrown upon this by the fifth finding of the Court of Claims, giving a letter and telegram of March 31 from the Surgeon-General to the Assistant Surgeon-General at St. Louis, who doubtless showed or explained them to Parish on April 2, when giving him "oral information" about the "suspension" of the order. They read as follows:

SURGEON-GENERAL'S OFFICE,
March 31, 1863.

Parish & Co. have *not* contracted for 30,000 tons of ice. Suspend the order you gave him.

W. A. HAMMOND,
Surgeon-Gen'l.

Col. R. C. WOOD,
Asst. Surgeon-General U. S. Army,
St. Louis.

SURGEON-GENERAL'S OFFICE,
Washington, D. C., March 31, 1863.

SIR: Your communication of the 25th instant to J. W. Parish & Co. in regard to the quantities of ice to be delivered at the different

points for which they contract, forwarded to this office for the information of the Surgeon-General, has been received.

I am instructed to inform you that the contract with Parish & Co. was made for *such quantities* as might be needed, and that the ice should be ordered from them, *from time to time*, to different points, in lots of *a few hundred tons, as needed.*

Very respectfully,

Your obedient servant,

C. H. ALDEN,

Assistant Surgeon, U. S. A.

Col. R. C. WOOD,

Assistant Surgeon-General, St. Louis, Mo.

Not only does the record indicate that business went along in the matter of purchasing, tendering, and receiving ice under the contract, very much as if no attention, except for purposes of litigation, was ever to be paid to the order or its suspension, but there is another notable thing in the record, viz, the Court of Claims makes the significant finding that claimant "purchased or *contracted for the purchase* of 23,000 tons of ice."

Ice is a peculiar commodity, and all manner of contracts can be made. Without undertaking to guess what the evidence collected by the Court of Claims shows on this point, we suggest that it ought not to be concluded that claimant paid for, received, and lost by melting all the ice he contracted to purchase, except the 12,768 tons he delivered. Besides, it is admitted that even a purchase of 23,000 tons in the far north throws very little light on the quantity

which that would represent in 1863 as ice deliverable at Cairo or St. Louis.

Here is another region into which the Secretary of the Treasury may well proceed in his full and complete examination.

How much of this non-delivered ice was melting ice and how much was dry paper, and of the meltable ice how much would have arrived unmelted at Cairo, etc.?

APPELLANT'S BRIEF.

Probably no case is as often quoted as one relied upon in appellant's brief, page 22, Marbury against Madison, and yet we all know that the only thing decided, after the more or less controversial opinion in that case, was that this court had no jurisdiction to decide about the mandamus, because "the legislature could not give any original jurisdiction in such a case." And this court has since remarked that the case should, as an authority, be confined to the point decided, whereas "in the reasoning of the court in support of this decision some expressions are used which go far beyond it." (*Cohens* v. *Virginia*, 6 Wheat., 399.)

We have no quarrel with *Kendall* v. *U. S.* The head of a department can not control the quasi judicial action of auditors and the like; neither, we may venture to suggest, can he delegate his own quasi judicial functions to any of them.

The rule appellant quotes from *U. S.* v. *Black* (128 U. S., 48) states the law correctly.

It is hardly necessary at this late day to seek his powers in remote analogies about the supervisors of

Otsego, as the law concerning the heads of our executive departments is well settled by direct decisions of this and other federal courts.

We have no quarrel with *Butterworth* v. *Hoe*. The "duty" here was to examine and decide on the appellant's claim and did not need "judicial process to enforce it." The question is whether judicial process is to upset the performance of it.

We have no objection to the proposition that the mere fact that an officer must interpret any law requiring him to perform a plain duty does not convert his duty from ministerial to quasi-judicial.

The latter half of the appellant's brief is ingenious, but is incorrect on page 47 in quoting Finding XI, which merely says that the order of March 25, 1863, remained suspended. Other erroneous statements are noted on pages 3 and 17 about the 12,768 tons; page 5, that this court held Wood's letter to be part of the contract; page 6, in stating alleged "legislation judgment;" page 18, "Congress referred" should be a committee referred.

We do not understand that this case turns on the correctness of the legal arguments of the Secretary of the Treasury in his answer, any more than upon the correctness of his decision on the claim of Parish. Some of his arguments seem to be very good.

CONCLUDING REMARKS.

We understand that the question here, as the case is presented, is, Shall the Secretary be ordered to accept the finding of the auditor as conclusive?

Obviously the special act does not require that he should. That is too plain for argument.

However, supposing a proper case had been presented to raise the other question, Was the Secretary given a mere order to do a thing about which people could not differ or was he ordered to use his judgment? We think the answer is equally obvious.

If the Secretary had been told to carefully examine and adjudicate whether 2 and 2 make 4, and, if so, to pay the claimant so much money, we admit that the nature of things would force the conclusion that Congress intended a mere sum in addition and nothing more. We should incidentally be forced to admit that Congressmen had been guilty of absurdity or a trick.

This court can not but be shocked at the proposition that the Secretary should pay still more money to a claimant who asked $65,000 and has accepted, with temporary gratitude, two or three hundred thousand; to a claimant who relies on people's presuming things in his favor which are by no means satisfactorily proven or probable; who steers an inconsistent course through the findings, the evidence, the principles of res judicata, the authoritative decisions of this court, etc.

What was the real loss of the claimant, not in theories about tenders and res judicata, but in fact?

How much ice did he buy and pay for and actually lose?

Did he not know and know early that the Surgeon-General was "instructed" to and repudiated his assistant's order for 30,000 tons and take measures to prevent loss, as any sensible man would have done?

Did he ignore the difference between ice for Nashville and Memphis, to be delivered "without delay," and ice for Cairo and St. Louis?

Did he not understand and acquiesce in and make a reasonable profit from the supplying of ice as per the letter and telegram of March 31, 1863, to Assistant Wood and the terms of his contract?

That he knew of that letter and telegram on April 2, and thereby knew that the "order" was not temporarily suspended but canceled, appears to us from circumstantial evidence so strong that men have been hanged on weaker. He got "oral information" about the suspension from the man who had just received both the telegram and the letter.

Where is the practical, not theoretical, indication that he really lost the ice he purchased or contracted to purchase?

When we look for proof, we are given language of this court as finding facts, told that an act of Congress has adjudicated, treated to finding 9 of the Court of Claims, which is accompanied by a finding about the impossibility of carrying ice from Lake Pepin. We ask to be shown ice, and we are given words and theories.

This is not so much a question of the independence of the executive branch of the Government and its right as such to be free from interference in performing its functions. It is a question of carrying out a special law of Congress referring a matter expressly and solely to the Secretary of the Treasury, as it might have been referred to anyone else Congress

preferred. The will of Congress is what we are seeking. And certainly every presumption is in favor of the exclusive authority to act of the person selected by Congress to act. It was easy for Congress to refer the same matter to the courts or to give an appeal to the courts. It did neither, and absolutely the only excuse for the courts to meddle would be that the Secretary sat still and would not examine the claim or that he was unequivocally ordered to do a mere sum in addition, multiplication, and subtraction, and would not do that.

As soon as the slightest amount of judgment about facts or law is shown to be involved, the inalienable right of the Secretary to decide the wrong way becomes as clear as that of this court to do the like in cases submitted to it, and this because the maker of the law saw fit to rely upon the judgment of the Secretary.

If Congress has decided what ought to be paid, and merely ordered the Secretary to pay it, the courts can bring in their extraordinary writ to *enforce* the will of Congress against an obstinate man; but if Congress has chosen that the Secretary shall examine evidence and determine from it and a rule of decision whether or not anything is due and ought to be paid, and he does decide that nothing is due, the courts have no right to interfere and thus *thwart* the will of Congress.

Respectfully submitted.

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Assistant Attorney-General.

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